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August 15, 2008

HAND-DELIVERED

Mr. Douglas M. Dunham
Deputy Assistant Director
Arizona Department of Water Resources
3550 N. Central Avenue
Second Floor
Phoenix, AZ 85012

**Re: Comments on Proposed Rules regarding Transportation of Groundwater
into Active Management Area (draft dated 6/18/08)**

Dear Doug:

As you know, our firm represents Desert Mountain Properties Limited Partnership (Desert Mountain), developer of the Desert Mountain master-planned community located within the City of Scottsdale. Desert Mountain is an IWDS participant and customer of the City. The City's IWDS is a water distribution, storage and recovery system owned and operated by the City to deliver water to Desert Mountain and others for golf course watering purposes and to other City customers for domestic water purposes. The planned long-term water supply for the IWDS is groundwater withdrawn from the Harquahala INA and transported by the City pursuant to A.R.S. § 45-554. As you are aware, the Scottsdale currently owns 1,215 acres of farmland within the Harquahala INA acquired to support groundwater transportation into the Phoenix AMA for use by the City to serve IWDS customers and City demands with the Carefree Sub-Basin. Desert Mountain has made, and continues to make, significant capital investments in the infrastructure of the IWDS and in the Harquahala INA farmland owned by the City.

Last fall, as a result of the Department's proposed rulemaking involving the Assured Water Supply (AWS) Rules¹, Desert Mountain and City of Scottsdale representatives met with you to discuss the potential impact of the proposed rules on the City's groundwater

¹ See, Rulemaking Docket opened March 30, 2007 entitled "Assured and Adequate Water Supply Rule Modification: Technical Corrections, Depth Exemption, Grey Water, and Importation Priority." The most recent version of the proposed rules is dated June 18, 2008, and the comments contained in this letter pertain to that version.

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transportation plans from the Harquahala INA. The City subsequently detailed its plans for withdrawal and transportation of these supplies in correspondence to you from Elizabeth Miller dated October 10, 2007 (see attached copy). As you are aware, the Central Arizona Water Conservation District ("CAWCD") granted the City water availability status, in accordance with A.R.S. § 48-3772 in 2001. A critical component of the City's water availability status was the Harquahala INA farmland, intended as the source of the future water supply to be made available to the CAWCD as required in A.R.S. § 48-3772(B)(10)(d). In 2002, the Department issued to the City an amendment to the City's designation of assured water supply pursuant to A.R.S. § 45-576.07, relying on the City's water availability status to prove an additional 3,460 acre feet of assured water supply, based on 3,645 acre-feet per year of groundwater available in the Harquahala INA. As an IWDS participant, Desert Mountain is directly interested in the impact of the proposed rules on the City's ability to transport groundwater from the Harquahala INA as the long-term water supply for IWDS purposes.

The purpose of this letter is to provide the Department with comments regarding the proposed rules – in particular, those rules addressing the transportation of groundwater from the Harquahala INA pursuant to A.R.S. § 45-554.

Initially, we would like to thank the Department for allowing us the opportunity to comment informally on the proposed rules and for taking the time to meet with us recently regarding our concerns related to the proposed rules. However, we do not believe we have resolved the central issues that give us the most concern with the proposed rules. Therefore, we would like to take this opportunity to once again urge the Department to review our comments and consider modifications for the proposed rules as appropriate.

Our primary concerns remain: (i) the authority of the Department to establish a new permitting requirement for groundwater transportation under A.R.S. § 45-554; and (ii) assuming that a permitting process is adopted, the lack of precise technical requirements for necessary hydrologic studies and the resulting inability to identify the economic impacts of the proposed rules. In addition, given that any such permitting process will be imposed more than six years after Scottsdale's receipt of its amended designation, we contend that the proposed rules must recognize Scottsdale's unique position and not inadvertently prejudice its assured water supply designation. These and other points are detailed below.

Although we support the Department's interest in developing rules to address transportation and believe that some of the provisions will assist in the planning of transportation activities, we believe our concerns raise serious issues regarding the implementation and economic impact of the proposed rules that have not been addressed by the Department.

We have reviewed the comment letter submitted by Ms. Miller on behalf of the City of Scottsdale and, although we may differ in some of the specific recommendations, in general, the City's comments parallel our own and we support the concepts expressed. In particular, we

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support the City's comments with respect to the potential impact of the proposed rules on the City's designation of assured water supply and urge the Department to work with the City to resolve their concerns.

We have detailed our comments below and request that the Department continue to work with us and representatives of the City to address these concerns prior to moving forward with finalization of the proposed rules.

I. Lack of authority for establishing a permitting process for transportation activity pursuant to A.R.S. § 45-554.

The proposed rules seek to establish a permitting process for transportation of groundwater from the Harquahala pursuant to A.R.S. § 45-554. *See* proposed A.A.C. R12-15-1407 (A). However, we note that the authorizing statute governing groundwater transportation from the Harquahala INA does not indicate that a permit is necessary. In contrast, other statutes governing transportation of groundwater refer expressly to permitting requirements. For example, under A.R.S. § 45-547 dealing with the transportation of groundwater withdrawn in the Yuma basin, the statute expressly requires a permit from the director for such activity. Clearly, if the legislature had wanted to include a permitting process for transportation from the Harquahala INA under A.R.S. § 45-554, it could have provided such a requirement in statute.

Although there is some language within A.R.S. § 45-554 suggesting a determination of the director may be required, we do not believe that this language justifies the imposition of a complicated permitting process that is sure to involve considerable additional economic costs for affected parties, such as the City of Scottsdale and, indirectly, its customer base. Specifically, A.R.S. § 45-554(B)(2)(b) states that, in the event a transporting entity plans to withdraw an amount greater than the statutory limit set forth in A.R.S. § 45-554(B)(2)(a), the amount of transportation withdrawals are to be limited as “[e]stablished by the director, but only if the director determines that withdrawals in an amount greater than that permitted by [A.R.S. § 45-554(B)(2)(a)] will not unreasonably increase damage to residents of surrounding land” Similarly, the statute provides for a determination by the director under A.R.S. § 45-554(C), but that provision only applies if the state or political subdivisions own 80 percent or more of the Harquahala INA farmland. These provisions are the only references in the statute to a determination by the director and, on their face, they do not apply to transportation withdrawals within the statutory limits set forth under A.R.S. § 45-554. These provisions clearly do not justify the imposition of a permitting process *for all transportation activities* under A.R.S. § 45-554.

Finally, although A.R.S. § 45-554(B)(1) imposes depth of water limitations for proposed withdrawals, and A.R.S. § 45-554(B)(2)(a) imposes withdrawal limitations, these limitations are clearly identified in statute, and do not require a permitting process for implementation. As you are aware, at this time, there is no actual transportation activity taking place from the Harquahala

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INA. In the event the Department conducts its own technical review of any future transportation activities, once initiated, and determines that the statutory limitations under A.R.S. § 45-554 are not being complied with, the Department has full authority pursuant to Article 12 of the Groundwater Code to take appropriate enforcement action. There is no need to establish a complex permitting requirement to assure the compliance of these statutory limitations.

We urge the Department to reconsider its position regarding the need for a permitting process set forth in administrative rules when no such requirement seems supported in statute. We do not believe it is necessary for the City of Scottsdale to seek a permit to transport groundwater supplies from the Harquahala INA, as is currently incorporated on the City's designation; rather we believe the standards of the statute are clear without the need for a permit as proposed in the draft rules.

Assuming that the Department proceeds with a permitting process for groundwater transportation, we offer the following comments.

II. Vagueness of proposed technical standards for obtaining Transportation Permit and Unidentified Economic Impact of the Permitting Requirements.

As previously noted, we are very concerned that the proposed standard of criteria for obtaining a permit is vague and not identified with specificity in the draft rules. Specifically, under proposed A.A.C. R12-15-1407(A)(9) and (10), the rules simply require that a “**hydrologic study, using a method of analysis approved by the director**” be submitted for purposes of demonstrating depth to water projections and water table decline rates. If the Department is to move forward with a permitting scheme, we are concerned that the standard as set forth under the rules is entirely subjective and does not adequately inform potential applicants of the real technical requirements for obtaining the permit.

We understand that the Department intends to set forth technical requirements for an acceptable hydrologic study in a separate “policy statement,” rather than including those express technical requirements in the rules. To the extent that such a policy statement identifies any specific technical requirements that must be satisfied in order to obtain approval of a hydrologic study that is a requirement for a transportation permit under the proposed rules, we believe the policy statement would meet the definition of a “rule” as defined under A.R.S. § 45-1001(17). Such technical requirements would not be appropriate for a policy statement; rather, they should be included in the proposed rules. For this reason, we urge the Department to set forth in the rules the express technical requirements for the hydrologic studies so that the regulatory community can understand the true nature of these requirements and can comment on them.

As noted above, the language in the rule, i.e. a hydrologic study, using a method of analysis approved by the director, is highly subjective and does not recognize the value of technical opinions of prominent scientific experts in the field of hydrology. If the Department is not willing to specify the technical requirements of hydrologic studies in the proposed rules, we

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urge the Department to revise the standard to require hydrologic studies “using a method of analysis generally accepted within the hydro-geologic scientific community.” This legal standard, although less precise than detailed rule criteria, would provide a reasonable basis for assessing the methodology required by the Department pursuant to the proposed rules.

As you are aware, under the Administrative Procedures Act agency rulemaking review before the Governor’s Regulatory Review Council (“GRRC”), the Department must specifically identify the economic impact of proposed rules. *See* A.R.S. § 41-1055 (requiring an economic, small business, and consumer impact statement). As the IWDS participants are the City’s water customers relying on the Harquahala INA groundwater supplies included within the City’s designation, it is likely that the IWDS participants will directly or indirectly pay the costs related to any permitting process established by the Department. However, frankly, it is difficult for us to identify what those cost could possibly be, as the standard for approval of the required hydrologic study identified in the proposed rules provides us no guidance. As the Department has yet to write the policy statement that will set forth the true technical requirements for permit issuance, we cannot engage a consultant to estimate the likely costs to complete a study for which no standards are yet identified. If it is impossible for us to determine the economic impact of the proposed hydrologic study set forth in the rule package, we submit that it is impossible for the Department, at this time, to appropriately inform the GRRC of the true economic impact of the proposed rules.

Again, we urge the Department to clearly identify the technical standards for approval of hydrologic studies under the proposed rules to provide an opportunity for the regulated community to comment on them and so that the appropriate economic costs can be estimated by the regulated community.

III. Interplay between proposed Hydrologic Study Requirements under proposed R12-15-1407(A)(9), (10), and (11) and the Assured Water Supply Program.

To obtain a permit to transport groundwater from Scottsdale’s Harquahala INA farmland, proposed R12-15-1407(A)(9) and (10), specifically require the submittal of a “**hydrologic study, using a method of analysis approved by the director**” to demonstrate: (1) the depth-to-static water level at the location where the groundwater will be withdrawn at the end of the withdrawal period; and (2) the average annual rate of water table declines from the area of withdrawal. In both cases, the applicant must take into account water table declines projected under R12-15-716(B)(3) – including prior assured and adequate water supply determinations. Under proposed R12-15-1407(11), the applicant is required to submit a hydrologic study to demonstrate that withdrawals from depths between 1,000 and 1,200 feet below land surface will not cause unreasonably increasing damage to surrounding land and water users.

First of all, we contend that Scottsdale provided adequate proof of physical availability of water from its Harquahala farmland when it received its 2002 amended designation of AWS. In

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connection with the processing of the City's designation application, the Department staff must have reviewed hydrologic information relating to the physical availability of supplies in the Harquahala INA. Nonetheless, as a result of the proposed rules as currently written, the City may be required to "re-prove" the physical availability of these supplies. We urge the Department to exclude from the proposed rules permit applicants that previously received a designation of assured water supply based on water availability status wherein the long-term water supply is groundwater to be withdrawn under A.R.S. § 45-554.

Alternatively, we note that the City's situation is unique in that the City has already been issued a designation of AWS based on its water availability status, and Harquahala INA groundwater is intended to be the long-term supply supporting its water availability status. If the proposed rules are adopted, the Department will impose the permit requirement more than six years after the issuance of the amended designation. Given that time lag, we contend that the Department should allow the city to apply for a hydrologic study that considers hydrologic conditions as of the date of the designation. Otherwise, the City may be required to take into account assured and adequate water supply determinations, for example, that were approved after the City's designation. This result would be precisely the reverse of what should occur – when approving intervening assured and adequate water supply determinations, the Department should have taken into account the 3,645 acre-feet of Harquahala INA groundwater utilized by Scottsdale to demonstrate 3,460 acre-feet of assured water supply in Scottsdale's 2002 amended designation.

Finally, we urge the Department to make clear that the 3,645 acre-feet of Harquahala INA groundwater by Scottsdale to demonstrate, 3,460 acre feet of assured water supply under the City's 2002 amended designation constitutes a demand on the Harquahala INA groundwater supply that future permit applicants must take into account under proposed rule R12-15-1407(A)(9), (10), and (11). Indeed, this volume of water should be taken into account by all applicants for an assured or adequate water supply determination that are in the vicinity of Scottsdale's Harquahala farmland.

In general, we urge the Department to work with the City to develop clear standards for the hydrologic study requirements under the proposed transportation rules and how they related to the AWS program requirements.

IV. Clarification of Timing of Application by City for Allocation and Permit for Transportation of Groundwater pursuant to A.R.S. § 45-554.

As you are aware, although the City of Scottsdale has acquired lands within the Harquahala INA with the intent to transport groundwater to the Phoenix AMA, the City does not plan to actually begin such transportation activities for a considerable time. Assuming the City applies for a permit, we believe it is important for the term of the permit to match the transportation plans of the City. Our recent discussions suggest that the Department is willing to

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establish a permitting timeline, where a permit would be issued and effective, but the duration of the permit would cover a 100-year period beginning at the initiation of transportation activity. For example, proposed rule R12-15-1407(A)(6) currently provides that the applicant state "the number of years after the date **the application is filed . . .**" during which groundwater withdrawals will take place. This language should be revised to read "[t]he number of years after the date **transportation of groundwater commences . . .**" Similarly, R12-15-1407(C)(5) should be revised to read "[t]he term of the permit, which shall not exceed one hundred years from the date transportation commences." We request the Department modify the rules to be consistent with this concept.

V. Priority Determination for City of Scottsdale's Transportation of Groundwater from Harquahala INA.

We understand that the Department no longer plans to develop specific rules addressing priority of transported groundwater. It is our understanding that at this time the Department has not specifically responded to Ms. Miller's correspondence of October 10, 2007 wherein the issue of the City's priority to the Harquahala INA supplies was addressed.

As you are aware, we believe the City of Scottsdale has already relied on the ability to transport groundwater from the Harquahala INA in association with its designation of AWS and the Department has reviewed this matter in association with the City's designation of AWS. We are concerned that the permitting process as set forth in the proposed rules does not adequately identify the City's priority to transport those supplies consistent with the requirements of A.R.S. § 45-554 and that the City's priority for an allocation may be impacted or "clouded" in some way by the proposed rules.

In short, we request that the Department meet with us and representatives of the City to address the priority issue specifically.

VI. Location of Withdrawal Wells, proposed R12-15-1408.

We understand that the proposed R12-15-1408(C) will enable the City of Scottsdale to withdraw groundwater for transportation from any eligible irrigation acres owned by the City within the Harquahala INA. We support the standard presented in the proposed rule and note that we believe it is consistent with both the statutory requirements for transportation of groundwater under A.R.S. § 45-554, as well as the City's plans for withdrawal wells as detailed in Ms. Miller's letter dated October 10, 2007.

VII. Public Notice for Transportation Permits

Finally, if the Department moves forward to establish a permitting process for transportations pursuant to A.R.S. § 45-554, we believe it is critical that a formal public noticing and objection procedure be established in the proposed rules. Specifically, we request that the

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Department provide first-class mail notice and an opportunity to object to all holders of a previously issued transportation permits. To the extent that, by issuing a groundwater transportation permit, the Department will be "allocating" supplies for transportation from the Harquahala INA, it is important for permit holders to have the opportunity to be notified, and, if appropriate, file administrative objections, to subsequent requests for permits that may have the potential to impact prior approved transportation supplies.

For a public notice provision, we suggest the following:

R12-15-1407:

E. Within seven (7) days of receiving an application for a permit under this section, the director shall give first-class mail notice of the application to all entities that have been previously issued a permit pursuant to this section. The notice shall state the name and address of the applicant, the amount of groundwater requested for transportation from the Harquahala INA in the application, the eligible irrigation acres identified in the application, the proposed points of withdrawal for the groundwater, and the term of the permit as requested on the application.

F. Prior to granting a permit pursuant to this section, the director shall give the applicant, and any entities that have been issued noticed pursuant to subsection (E) of this section, first-class mail notice that the director has determined the application to be complete and correct. Within forty-five (45) days of receipt of a notice pursuant to this sub-section, any parties given notice pursuant to sub-section (E) of this section may file an objection to the application with the director. The grounds for objection shall be limited to whether the applicant has demonstrated the requirements of A.R.S. § 45-554 and this section, and whether the applicant's proposed transportation will impact permits previously issued by the director under sub-section (C) of this section. The director shall consider and respond in writing to all properly filed objections prior to issuance of a permit.

G. The director's determination under this section shall be subject to rehearing or review, and to judicial review as provided in A.R.S. § 45-114.

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We look forward to working with the Department as the proposed rules are finalized. If you have any questions, please do not hesitate to give me a call.

Sincerely,

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Shilpa Hunter-Patel

SHPA/jas

cc: Maggie Gallogly
Elizabeth Miller
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Ken Slowinski

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